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IN THE

Supreme Court of the United States

No. 277 October Term, 1947

ARNOLD BERNSTEIN, also known as
ARNOLD M. BERNSTEIN,

Petitioner,

against

VAN HEYGHEN FRERES SOCIETE ANONYME,

Respondent.

PETITION OF ARNOLD BERNSTEIN, ALSO KNOWN AS ARNOLD M. BERNSTEIN, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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CONTENTS

	PAGE
INTRODUCTION	1
OPINIONS BELOW	2
STATEMENT OF MATTER INVOLVED	2
JURISDICTION	5
QUESTIONS PRESENTED	5
SPECIFICATIONS OF ERRORS TO BE URGED	7
REASONS RELIED ON FOR ALLOWANCE OF WRIT	10
1. The lower courts have erroneously decided an important and novel question, *i. e.*, whether the "act of state" doctrine may be invoked in relation to a defeated enemy, the Third German Reich. The decisions below conflict with the principles governing the "act of state" doctrine, as enunciated by this Court. In any event, the Executive has acted to relieve the courts of the restraint upon the exercise of their jurisdiction imposed by that doctrine	10
A. The decisions below conflict with the principles governing the application of the "act of state" doctrine, as enunciated by this Court	10
B. In any event, the Executive has acted to free the courts of the restraint upon the exercise of their jurisdiction imposed by that doctrine	14
2. The petitioner has been denied his right to a fair trial and a day in court as a result of the erroneous rulings below	18
3. The District Court, on the record before it, lacked the power to dismiss the complaint	24
CONCLUSION	25
APPENDIX—Material submitted to the court below indicative of the policy of the American Executive	a

Cases

PAGE

Banco de Espana v. Federal Reserve Bank, 114 F. (2d) 438 (C. C. A. (2d)) 10, 13

Barrett v. National Malleable & Steel Castings Co., 68 F. Supp. 410 (W. D. Pa. 1946) 413, 418 19

Bowles v. Sunshine Packing Corporation, 5 F. R. D. 282, 287 (W. D. Pa., 1946) 19

Gilbert v. David, 235 U. S. 561 23

Gribble v. Ditto, 119 F. (2d) 278, 280 (C. C. A. 2d, 1941) 19

Hewitt v. Speyer, 250 F. 367 (C. C. A. 2d, 1918) 11

Horn v. Mitchell, 223 Fed. 549, aff'd 232 Fed. 819, app. dism'd 243 U. S. 247 23

Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, 32 F. (2d) 195 23

KVOS, Inc. v. Associated Press, 299 U. S. 269 23

Land v. Dollar, 67 S. Ct. 1009, 1011 23

Levenson v. B. & M. Furniture Co., 120 F. (2d) 1009 (C. C. A. 2d 1941) 19

McNutt v. General Motors, 298 U. S. 178 23

Molina v. Comision Reguladora, 92 N. J. L. 38, 104 Atl. 450 23

North Pacific Steamship Co. v. Soley, 257 U. S. 216 23

Oetjen v. Central Leather Co., 246 U. S. 297 ..8, 10, 11, 12, 14

Pilger v. U. S. Steel Corp., 98 N. J. Eq. 665, 130 Atl. 523 23

Poindexter v. Greenhow, 114 U. S. 270, 288 23

Porter v. Karavas, 157 F. 2d 984 (C. C. A. 10, 1946) 22

Princess Paley Olga v. Weisz (1929), 1 K. B. 718 .... 11, 23

Republic of Mexico v. Hoffman, 324 U. S. 30 (1945) 8, 12, 14, 16

PAGE

Ricaud v. American Metal Co., 246 U. S. 304 8
Roberts v. Lewis, 144 U. S. 653 23

Sloan Shipyards v. U. S. Fleet Corp., 258 U. S. 549, 565-67 23
Steigleder v. McQuestion, 198 U. S. 141 23

The Bank of the U. S. v. Planters' Bank, 9 Wheat. 904, 907 23
The Beaton Park, 65 F. Supp. 211, 212-213 23
The Claveresk, 264 F. 276 (C. C. A. 2d, 1920) 11
The Maret, 145 F. 2d 431, 440 (C. C. A. 3d, 1944) .. 15

Underhill v. Hernandez, 168 U. S. 250 .....8, 11, 12, 14
Union Shipping & Trading Co. v. United States, 127 F. (2d) 771, 774 (C. C. A. 2d) 11
United States v. Pink, 315 U. S. 203, 233 ..... 14, 15
United States ex rel. D'Esquiva v. Uhl, 137 F. (2d) 903, 906-907 (C. C. A. 2d, 1943) 15
United States v. Deutsches Kalisyndikat, 31 F. (2d) 199 23

Wetmore v. Rymer, 169 U. S. 115 23

Statutes

Judicial Code as amended, Section 240(a) (28 U. S. C. A., Sec. 347(a)) 5

Federal Rules of Civil Procedure:
Rule 64 18
Rule 8(f) 19
Rule 6(d) 25

Authorities

PAGE

Webster's New International Dictionary, Second Ed. (1939) 20

G. D. H. Cole and Margaret Cole, *A Guide to Modern Politics* (1934), pp. 146 et seq. 21

Encyclopaedia Britannica 1938 Book of the Year .... 21fn.

Miscellaneous

Directive of July 15, 1947, approved by State, War and Navy Departments (N. Y. Times, July 16, 1947) 8

Directive JCS 1067 (State Department Publication No. 2423, pp. 40-59) 15

Military Government Law No. 52 ..... 17fn.

4 Office of United States Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression, pp. 288, 302-305, 425, 443 ..... 20fn.

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PETITION OF ARNOLD BERNSTEIN, ALSO KNOWN AS ARNOLD M. BERNSTEIN, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Arnold Bernstein, also known as Arnold M. Bernstein, respectfully prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit, affirming an order of the United States District Court for the Southern District of New York vacating a warrant of attachment of defendant's property and dismissing the complaint herein.

Opinions Below

The opinion of the Circuit Court of Appeals, dated July 10, 1947, appears at R. 61* and is reported at—Fed. (2d) ———. The opinion of the District Court appears at R. 50 and is reported at ———F. Supp. ———.

Statement of Matter Involved

The plaintiff, petitioner herein, formerly a German national and now an American citizen, owned shipping interests in Germany (R. 11, 18, 19). He returned to Germany in 1937 and was arrested on trumped-up charges of violating German foreign exchange regulations (R. 12, 19). Under duress by "Nazi officials and others" the plaintiff, while still in prison, transferred control of his shipping interests to one Marius Boeger, a German private citizen (R. 12, 19). Boeger in turn caused to be transferred to the defendant, respondent herein, a vessel included among such interests, for an inadequate consideration (R. 12, 19-20, 24-26). The defendant, a Belgian business concern, had knowledge or full notice of the circumstances of duress under which the plaintiff had transferred control of the vessel (R. 13, 20).

The petitioner brought this action in the New York Supreme Court for recovery of the loss occasioned by the conversion of the vessel, aggregating approximately $900,000. The complaint contained four counts, for conversion and for money had and received (R. 18-23). The

* All record references are to pages of the record.

action was commenced by petitioner's obtaining a warrant of attachment on the insurance proceeds of the vessel, which had meanwhile been sunk (R. 47-49).

At the defendant's instance, the action was removed to the United States District Court for the Southern District of New York on the ground of diversity of citizenship (R. 8). Before joinder of issue, the defendant moved in the District Court to vacate the warrant of attachment (R. 5-6). The District Court granted an order vacating the warrant of attachment and also dismissing the complaint (R. 54-56). The Circuit Court of Appeals, one judge dissenting, affirmed the order of the District Court (R. 61-77).

The complaint (par. 6) alleged *inter alia* that the plaintiff had been coerced by "Nazi officials and others" into divesting himself of his shipping interests (R. 19). On a motion to vacate the attachment the District Court construed the phrase "Nazi officials" to mean *agents of the German government acting within the scope of their delegated powers,* and held that since a court of this forum cannot inquire into the acts of a foreign government committed within its jurisdiction, the court was powerless to afford a remedy (R. 53). The majority opinion of the Circuit Court, affirming the District Court, stated that the primary question on appeal was "whether the determination of the validity of acts of the German Government in 1937 is within the jurisdiction of a court of the State of New York" (R. 63), and again invoked the "non-inquiry" rule as to foreign "acts of state" to bar the action (R. 65,

72). The Circuit Court further construed pertinent expressions of the Executive branch of our government as insufficient to permit judicial inquiry into acts of the Nazi regime in Germany (R. 69).

The minority opinion took the position that at the present stage of the proceedings "enough has been shown—or is within our judicial ken—to justify allowing the plaintiff a trial rather than dismissing his case finally on this preliminary motion" (R. 73). The dissenting judge interpreted the cited actions of the Executive as repudiating the Nazi regime and freeing our courts from the restraint of the "act of state" doctrine* (R. 76). He reached the conclusion that in any event a trial should be ordered so that official definition of Executive policy could be procured and a full inquiry made dealing "with actualities at the time" (R. 73, 74, 75).

It is clear that the courts below found as a fact, on the bare pleadings (only petitioner's complaint and affidavit in support of the attachment), and with no opportunity afforded to present evidence, that the phrase "Nazi officials" in the complaint necessarily referred to *German governmental agents, acting pursuant to their governmental authority and for a governmental purpose.* The petitioner seeks an opportunity to prove that the duress exerted by these "Nazi officials" was personal and for private ends, and *not* governmental—and that therefore the "act of

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* The theory that under certain conditions courts of the forum will not inquire into the acts of a foreign state committed within its territory is for brevity hereafter variously referred to as the "non-inquiry" rule or doctrine, the "act of state" doctrine, the doctrine of "judicial abstention", or simply as the "doctrine".

state'' doctrine does not operate to restrain inquiry in this case. Furthermore, it is the petitioner's contention that in any event the ''act of state'' doctrine ought not to be invoked here since (1) the conditions prescribed by this Court prerequisite to the application of the doctrine are not present here, and (2) there is a clear expression of policy by the Executive branch of the government which renders its application here inconsistent and erroneous.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (28 U. S. C. A., Section 347 (a)).

Questions Presented

1. May an American court having jurisdiction close its doors to one now an American citizen who, while a resident of New York and in Germany on business, was a victim of an act of extortion, on the theory that it is powerless to proceed because ''Nazi officials'' allegedly participated in the extortion?

2. Was not the petitioner improperly deprived of his right to a fair trial by (a) the rulings of the courts below, on preliminary motion before answer, that an allegation of coercion by ''Nazi officials and others'' inducing the petitioner to surrender his property, necessarily and conclusively meant coercion by German governmental authorities *acting officially*, and (b) the consequent dismissal of the complaint on the basis of the ''act of state'' doctrine,

without affording the petitioner an opportunity to prove that, in fact, the "Nazi officials" were acting in a private capacity and in their own interests, so that such doctrine was not applicable?

3. Did not the District Court err in making findings of fact, *i.e.*, that the acts of duress in question were "acts of state", on the bare allegations of plaintiff's pleadings, precluding the introduction of proof to the contrary, where the words "Nazi officials" in the allegations were susceptible of different meanings?

4. Did not the lower court err, on preliminary motion before answer, in vacating the petitioner's attachment and dismissing his complaint on a finding by the court that an "act of state" was involved, thus precluding petitioner from the opportunity of establishing that the "Nazi officials" mentioned did not in fact act nor purport to act as governmental agents, that the transferee of the petitioner's property was a private citizen, and that no foreign sovereign interest was involved in the transaction by which the petitioner parted with his property, and was not the petitioner thereby deprived of due process of law?

5. Did not the lower courts err in invoking the "non-inquiry" doctrine in the instant case, inasmuch as the conditions for its application did not obtain here, *i.e.*, that the foreign sovereign be a *friendly, existing sovereign;* that the acts involved *lack malice or personal or private motive;* that judicial scrutiny of such foreign "acts of state" would *"imperil the amicable relations between governments and vex the peace of nations"*?

6. Assuming *arguendo* that the alleged "Nazi officials and others" were government agents, acting within the scope of their delegated powers, and for governmental purposes, was it not error for the lower courts to invoke the "non-inquiry" doctrine in the light of the American Executive's clearly expressed policy of restoration to those minorities despoiled by the Nazis, thereby relieving American courts of the restraint of the said doctrine?

7. Did not the lower courts err in failing, at this preliminary stage, to construe the complaint in the light most favorable to the plaintiff?

8. Did not the lower courts err in dismissing the complaint on a motion seeking only to vacate the warrant of attachment?

Specifications of Errors to Be Urged

The court below erred in that:

1. It vacated the attachment herein and dismissed the complaint on preliminary motion, before answer, without affording the petitioner the opportunity to which he was legally entitled to establish by proof clearly admissible under his pleadings that the German government under the Nazi regime was in fact not a participant in the transactions that are the basis of his claim.

2. It disregarded the applicable Federal and New York State law entitling a plaintiff, on a motion to vacate an attachment, to every favorable interpretation of his pleadings and to have them sustained unless it appears to a cer-

tainty that he would not be entitled to relief under any set of facts provable under his allegations.

3. It erroneously concluded that the petitioner's use of the phrase "Nazi officials" precluded the possibility of proof that the "officials" in question neither acted nor purported to act, in the transactions complained of, in governmental capacities, and that the phrase was used merely *descriptio personis*.

4. It erroneously interpreted the doctrine of non-inquiry into the transactions of a foreign sovereign within its own boundaries enunciated by this Court in *Underhill* v. *Hernandez*, 168 U. S. 250 and *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, to be applicable to the facts here, without requiring proof to establish facts prerequisite to its applicability, without inquiry of the American Executive, and contrary to the policy expressed in and inferable from acts and declarations of the American Executive relieving American courts of the restraint thereof upon the exercise of their jurisdiction herein.

5. It disregarded the limitations upon the said doctrine enunciated in the above and other decisions, *e.g.*, *Republic of Mexico* v. *Hoffman*, 324 U. S. 30; *Ricaud* v. *American Metal Co.*, 246 U. S. 304.

6. Contrary to official declarations indicating restoration of property despoiled under the Nazi regime to be the keystone of American Executive policy, it erroneously held the petitioner's claim to be "reserved for adjudication along with all other such claims as part of the final settlement with Germany" (R. 72).

7. It disregarded controlling rulings that American courts should proceed with the enforcement of the regular judicial processes unless constrained by established executive or legislative policy calling for judicial abstention, and in the absence of an explicit assertion of such policy and disregarding acts and declarations of the American executive negativing it, declined to direct the exercise of jurisdiction herein.

8. It held on preliminary motion, erroneously and prematurely, that for the petitioner to recover in this action, inquiry into the sovereign acts of a foreign government was necessary.

9. Having assumed that "if the plaintiff had been despoiled by a private person in Germany in the way he was in fact despoiled, a New York court would not feel bound to concede the validity of the transfer, even though under the law of Germany it was valid" (R. 71), it refused erroneously to reverse the decision and order of the District Court and to return the case to that court for the ascertainment upon a trial whether plaintiff was in fact despoiled by a private person or persons or by some government in Germany.

10. It affirmed the order of the District Court dismissing the complaint and denying the petitioner his right to a trial on the facts, despite the lack of power in the District Court to make such order, there being no motion properly before the Court for such relief.

Reasons Relied on for Allowance of Writ

1. The lower courts have erroneously decided an important and novel question, *i. e.*, whether the "act of state" doctrine may be invoked in relation to a defeated enemy, the Third German Reich. The decisions below conflict with the principles governing the "act of state" doctrine, as enunciated by this Court. In any event, the Executive has acted to relieve the courts of the restraint upon the exercise of their jurisdiction imposed by that doctrine.

A. *The decisions below conflict with the principles governing the application of the "act of state" doctrine, as enunciated by this Court.*

The question whether or not the "act of state" non-inquiry rule should apply as to acts of the Nazi regime is an important question, and one of first impression. It was recognized as such in the dissenting opinion in the court below (R. 73).

The doctrine is premised upon the condition that the foreign nation to which we accord such judicial respect be one to which our Executive accords recognition as a *de facto* or *de jure* government. Cf. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Banco de Espana* v. *Federal Reserve Bank*, 114 F. (2d) 438 (C. C. A. (2d)). But, as the dissenting judge below observed,

> "those precedents do not deal with, or even appear to visualize, the situation where our Executive acts later to repudiate the recognition which it has granted and to declare the acts of that nation as wrongful and void, to be wiped out by a tremendous war effort and by acts of restitution and retribution at the war's end. Many things have happened since

> the days when Nazi Germany was the recognized government of German territory—so many and so important that *we have no precedent to govern this case. In short, a new one must be formulated.*" (Italics added) (R. 73)

The majority opinion, by implication at least, seems likewise to have recognized the novel character of this issue, for that opinion frankly states the view that an interpretation of the doctrine making it applicable to the instant case

> "was a necessary corollary of decisions of the Supreme Court, *and if we have been mistaken, the Supreme Court must correct it.*" (Italics added) (R. 65),

citing by footnote, but without allusion to the conditions and limitations implicit or expressly recognized therein, *Underhill* v. *Hernandez,* 168 U. S. 250, and *Oetjen* v. *Central Leather Co., supra.*

It is well settled that the validity of the official acts of a friendly foreign government within its territory may normally not be litigated in the courts of this forum. *Union Shipping & Trading Co.* v. *United States,* 127 F. (2d) 771, 774, (C. C. A. 2d); *The Claveresk,* 264 F. 276 (C. C. A. 2d, 1920); *Hewitt* v. *Speyer,* 250 F. 367 (C. C. A. 2d, 1918). Cf. *Princess Paley Olga* v. *Weisz,* (1929) 1 K. B. 718. This doctrine is conditioned, however, upon the existence of a friendly recognized foreign sovereign to which claimants may look for adequate redress of asserted wrongs, a sovereign whose official transactions are entitled, at the time of decision, to be respected in our courts. The doctrine is rooted in the theory that the prerogatives of the Execu-

tive in foreign relations must not be interfered with, lest amicable relations between nations be adversely affected. *Underhill* v. *Hernandez, supra; Oetjen* v. *Central Leather Co., supra.*

Furthermore, the doctrine is expressly limited by decisions of this Court to cases where the facts warrant a finding that the spoliation complained of had for its purpose "the benefit of the community" or foreign country concerned, and was not actuated "by malice or any personal or private motive".

These conditions precedent to the invocation of this doctrine constituted the rationale of the decisions of this Court in *Underhill* v. *Hernandez, supra,* and *Oetjen* v. *Central Leather Co., supra.* The complete absence of such prerequisite conditions, and the existence here of an entirely different and novel situation, was emphasized in the opinion of the dissenting judge in the court below (R. 72-73).

In the instant case, the record discloses no "benefit to the community" and it may fairly be inferred from the plaintiff's allegations that the transaction here involved "malice" and was actuated by "personal" and "private" motives (R. 19). Inquiry into the acts of the defunct Nazi regime in Germany will not "vex the peace of nations". There is no existing "friendly" foreign government involved, cf. *Republic of Mexico* v. *Hoffman,* 324 U. S. 30, 34 (1945), for the Third German Reich has been relegated to the limbo of history. There are no amicable relations existing between our government and the late German Reich. Indeed, the Executive has strikingly repudiated recognition of the Nazi regime and declared as its express policy the

undoing of the wrongs and restoration of property despoiled under it.

Banco de Espana v. *Federal Reserve Bank, supra,* a case in which inquiry into the official acts of a superseded foreign government was denied, is readily distinguishable from the case at bar. The court in its opinion in that case made it clear that its holding applied only in favor of persons dealing *directly with a foreign government.* "Persons *who dealt with the former Spanish government* are entitled to rely upon the finality and legality of that government's acts, at least so far as concerns inquiry by the courts of this country." (at p. 444)

Furthermore in the *Banco de Espana* case the government concerned (the Spanish Loyalist government, later overthrown by civil war) entertained friendly relations with our government, and indeed was at that time directly involved in commercial transactions with the American government. This situation contrasts sharply with the facts of the instant case, for the German government under the Nazi regime has the status of a *defeated enemy.* The *Banco de Espana* case, turning as it does on a change of regime in a continuing friendly state, can hardly be analogized to this case, involving a defeated enemy of our government.

Thus, there is no precedent in this Court for application of the "act of state" doctrine in the unique situation presented by the Third German Reich. The importance, as well as the novel character, of the question thus raised cannot be over-stated. This is one of the primary legal problems to arise out of the recent war, and its ramifications are of wide extent.

The importance of a definitive and final ruling by this Court on this unprecedented and significant question is therefore readily apparent. In invoking the doctrine in the instant case, the courts below resolved for the first time important questions as to the scope and applicability of the doctrine, expanded the doctrine to an extent which conflicts with the limitations previously imposed upon it by this Court (see *Republic of Mexico* v. *Hoffman, supra,* and the *Underhill* and *Oetjen cases, supra*), and disregarded the rationale of the decisions of this Court enunciating the "non-inquiry" rule.

B. *In any event, the Executive has acted to free the courts of the restraint upon the exercise of their jurisdiction imposed by that doctrine.*

The decision of the court below is diametrically opposed to and frustrates the policy of the Executive, and tends "to disturb that equilibrium in our foreign relations which the political departments of our national government had diligently endeavored to establish." *United States* v. *Pink,* 315 U. S. 203, 233. It also tends "to enlarge an immunity to an extent which the government * * * has not seen fit to recognize". *Republic of Mexico* v. *Hoffman,* 324 U. S. 30, 38.*

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* The *Republic of Mexico* v. *Hoffman* case is peculiarly apposite here. It involved a vessel, which the Republic of Mexico concededly owned, but of which it had not taken possession. The record here (R. 24-26) discloses that the vessel, erroneously characterized below (R. 63) as "confiscated" by the Nazi regime, was at the time of its transfer in June 1939 to the defendant still owned by and in the possession of the plaintiff's own shipping company.

This Court stated in the *Republic of Mexico* case, at p. 36, that

> "recognition by the Courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarassing to it."

The court below denominated as the critical issue in the case the question whether our own government has already acted to relieve the courts of restraint upon the exercise of their jurisdiction (R. 67).

The majority below concedes (R. 65) and the authorities agree that the acts of the Executive in the international political sphere are binding upon our courts. *United States* v. *Pink, supra; The Maret,* 145 F. 2d 431, 440 (C. C. A. 3d, 1944); see *United States ex rel D'Esquiva* v. *Uhl,* 137 F. (2d) 903, 906-907 (C. C. A. 2d, 1943).

Since the decision of the Circuit Court of Appeals, the Executive, with the approval of the State, War and Navy Departments, has issued a new directive (issued July 15, 1947; New York Times, July 16, 1947, p. 8) superseding J. C. S. Directive 1067 (State Department Publication No. 2423, pp. 40-59) referred to in the dissenting opinion below, which definitely enunciates American Executive policy here applicable. The initial paragraph states that:

> "This Directive * * * constitutes a statement of the objectives of your Government in Germany and of the basic policies to which your Government wishes you to give effect from the present time forward."

Paragraph 17, entitled "Restitution", in its subdivision (d) states:

> "It is the policy of your Government that persons and organizations deprived of their property as a result of National Socialist persecution should either have their property returned or be compensated therefor * * *"

The full text of the two foregoing subdivisions is printed for this Court's convenience in the Appendix of this brief (pp. b, c, *infra*).

The petitioner also referred the court below to a number of Executive expressions of policy (see Appendix, pp. a, b, *infra*), the nature, purpose, bearing and effect of which are to repudiate and to prescribe redress for acts of the Nazi regime in Germany. The dissenting judge was prepared on the basis of the above material to conclude that American executive policy had been disclosed sufficiently for American courts to be bound in circumstances such as exist here to exercise their jurisdiction (R. 74-76).

The majority opinion below failed to heed the impact and general sense of these executive pronouncements. The consistent endeavors of our Executive to institute and implement a program of restoration of despoiled property are a clear indication of the intent of the Executive to relax any restraint attributable to the "act of state" doctrine here.

This Court in *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 35, recently stated that

> "It is therefore not for the courts to deny an immunity which our government has seen fit to allow or to allow an immunity on new grounds which the government has not seen fit to recognize".

The concurring opinion in the same case stated (at pp. 41-42) that

> "courts should not disclaim jurisdiction which otherwise belongs to them * * * except when 'the department of the government charged with the conduct of

> our foreign relations', or of course Congress, explicitly asserts that the proper conduct of these relations calls for judicial abstention. Thereby responsibility for the conduct of our foreign relations will be placed where power lies. And unless constrained by the established policy of our State Department, courts will best discharge their responsibility by enforcement of the regular judicial processes".

The striking contrast between our Executive policy, as it clearly appears from the official expressions referred to above, and a judicial policy of non-inquiry into alleged "acts of state" of the Nazi regime, precisely measures the gross inconsistency of a policy "looking to restitution to the Jews in Germany at the same time that it accepts the acts of Nazi oppression of the Jews as binding in American courts." (Dissenting opinion, R. 76).

The net effect of these executive pronouncements is that looted property* found within Germany or former Axis territory will be restored to its owner, whereas by the decision below jurisdiction to achieve the same result in an American court is abdicated; in other words, within the territory of the former foreign sovereign, its acts or supposed acts get no respect, but in an American court on United States soil they become sacrosanct.

This is in direct conflict with the rationale of the decisions of this Court enunciating the doctrine of judicial abstention, and with the recent express pronouncements of

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* *i.e.*, "property which has been the subject of transfer under duress or wrongful acts of confiscation, dispossession or spoliation, whether pursuant to legislation or by procedure purporting to follow forms of law or otherwise". Cf. Military Government Law No. 52 (procurable from War Department), Art. I, par. 2.

this Court prescribing the regard to be accorded American Executive policy.

Accordingly, the petitioner's contention that the restraint of the "act of state" doctrine had no application should have been sustained. At the very least, if the precise nature of the Executive's policy was in doubt, such disputed issue of fact should properly have been resolved at a trial at which relevant evidence could have been introduced.

2. The petitioner has been denied his right to a fair trial and a day in court as a result of the erroneous rulings below.

Even if the lower court was correct in holding that the "act of state" doctrine applied to acts of the Nazi regime, nevertheless the court erred in applying the doctrine here, since no governmental acts were involved.

As has been indicated *supra,* the petitioner alleged in his complaint (par. 6) that acts of duress by "Nazi officials and others" caused him to divest himself of his property (R. 12, 19). On a motion to vacate the warrant of attachment, before answer, and on the petitioner's bare pleadings, the District Court held that it would not inquire into any wrong done, because a foreign "act of state" was involved (R.53). This ruling was based entirely on the court's construction of the phrase "Nazi officials" in the complaint. The petitioner was thus peremptorily denied the opportunity to present evidence to prove that in fact the acts of duress alleged were not committed as governmental acts but for private purpose of personal gain, and by private parties.

The complaint should have been viewed in a light most favorable to the plaintiff. Rule 64 of the Federal Rules of Civil Procedure provides that an "* * * action in which any

of the foregoing remedies (attachment, etc.) is used * * *, if removed from a state court, shall be prosecuted after removal, pursuant to these rules". The settled law in the federal courts is that a complaint "should be viewed in a light most favorable to the plaintiff", and that "a complaint should not be dismissed unless it appears *to a certainty* that the plaintiff would not be entitled to relief under *any* set of facts which could be proved in support of the allegations set forth therein" (italics added). *Bowles* v. *Sunshine Packing Corporation*, 5 F. R. D. 282, 287 (W. D. Pa., 1946), and Rules and cases therein cited; *Gribble* v. *Ditto*, 119 F. (2d) 278, 280 (C. C. A. 2d, 1941); *Levenson* v. *B. & M. Furniture Co.*, 120 F. (2d) 1009 (C. C. A. 2d 1941); see *Barrett* v. *National Malleable & Steel Castings Co.*, 68 F. Supp. 410 (W. D. Pa., 1946), at 413, 418; see F. R. C. P. 8(f).

Certainly even the New York rule, if that should apply, would require liberality in the construction of the complaint. That rule, as stated by the court below, would require the Court to uphold the attachment unless the papers upon which it was based "*clearly indicate* that the plaintiff *must* ultimately fail" (R. 64; italics supplied). The court below itself admitted that plaintiff could reclaim his property if he had been deprived of it under certain circumstances (R. 66-67),—circumstances which are clearly susceptible of proof under the allegations of the complaint herein.

The plaintiff here having alleged that he was induced by the coercion of "Nazi officials and others" to tranfer his property should therefore, by any liberal construction of his pleadings, have been permitted to prove that the acts of coercion involved were private and not governmental acts. Certainly if the court below had followed the rule which it itself enunciated, the plaintiff should have been

permitted to prove that the transaction involving the transfer of his property, which is the gravamen of this cause of action, was a transfer by him to a private person and that no German governmental acts were involved. Ignoring the reference to "others", and similiar allegations that the plaintiff's German lawyers had, while visiting him in jail, urged him to give up the property as the price of his safety, the court below concluded that the only possible construction of the allegation was that an "act of state" was involved.

The record lends no support whatever for the view that the "Nazi officials" held public office, and even less for the assumption that they purported to exercise governmental authority (R. 24-26). The widely prevalent pattern of threats by private individuals and Nazi party people, under the Hitler regime, against members of persecuted minorities for purposes of private enrichment, is now well-known. The non-governmental role in which such persons in Germany openly acted for their private gain is now abundantly clear;* in fact, sufficiently so as to be matter for judicial notice.

The term "Nazi" is a colloquial abbreviation for a German political party. It is a term, strictly speaking, of political reference. *Webster's New International Dictionary, Second Edition* (1939) contains the following definition: "Nazi: A member of the National Socialist Party of

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* *4 Office of United States Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression*, pp. 288, 302-305, 425, 443; *Official Transcript of the Proceedings of the International Military Tribunal*, mimeographed issue in English, May 6, 1946, p. 9037; see also *Institute of Jewish Affairs, American Jewish Congress, Hitler's Ten-Year War on the Jews* (1943), pp. 32-33, listing prominent examples of private enrichment by "aryanizations".

Germany; a Hitlerite.'"* It would be superfluous to labor the argument that "Nazi" clearly means and has always been taken to be a term of reference to the National Sozialistische Deutsche Arbeiterpartei. Precisely, that is all it now means or ever has meant, despite its no doubt widespread loose usage. Certainly the term came into common use long before the Nazis assumed control of the German government, and at a time when it could only have had reference to the Nazi party. See, *e.g.*, G. D. H. Cole and Margaret Cole, *A Guide to Modern Politics,* (1934) pp. 146 *et seq.* It is therefore fair to assume that in referring to "Nazi officials" the plaintiff meant officials in the Nazi party. If the plaintiff had intended to refer to officials of the German government he would have referred to them explicitly as "German government officials". Certainly, it cannot fairly be said that the term "Nazi officials" *conclusively* denoted government officials.

At the very least it may be argued that the phrase "Nazi officials" is latently ambiguous.** If so, it obviously

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* In an article written by Sidney B. Fay, Ph. D., L.H.D., Professor of History, Harvard University, for the *Encyclopaedia Britannica 1938 Book of the Year,* the word "Nazi" is defined as follows:

> "A popular and convenient but slightly derogatory abbreviation for members of the National Socialist Party led by Adolf Hitler since 1920. According to some writers it arose during the early days of the party as a derisive nickname from a local Bavarian slang expression meaning mountain country bumpkin or 'hill billy'. More probably it arose from the German pronunciation of the first two syllables (Nazi) of its long official name—National Sozialistische Deutsche Arbeiterpartei * * * just as the members of the Social Democratic party used to be known as Socis."

** The majority opinion below concedes the existence of a "dispute" as to the meaning of the phrase (R. 64).

is susceptible of construction as a term of political rather than governmental denotation. The courts below clearly erred in taking the construction that they did, for in so doing they construed the phrase against the plaintiff rather than liberally and in his favor. *Porter* v. *Karavas,* 157 F. 2d 984 (C. C. A. 10, 1946).

It should be noted at this point that the majority opinion of the court below apparently proceeded on the completely erroneous apprehension that the plaintiff had been afforded the opportunity to file an explanatory affidavit "in opposition" to the defendant's motion in the District Court (R. 62, 65). That is not the case. The attachment was vacated (and concurrently, and we contend erroneously, the complaint was dismissed) solely on the papers originally filed by the plaintiff.

The court below further erred in inferring a governmental "confiscation" of plaintiff's property to be alleged as the basis of his claim. The record contains no suggestion of governmental decree or order or of any administrative or judicial proceedings appropriating the plaintiff's property. On the contrary, it shows expressly that it was to *avoid* a threatened "confiscation", *inter alia,* that the plaintiff acted (R. 12).*

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* The prevailing opinion erroneously employs the word "confiscating" (R. 62) to paraphrase the plaintiff's allegation actually reading "dispossessing * * * by force, duress and coercion" (R. 20, at fol. 59),—a totally different concept in the circumstances here. One would be naive indeed to assume that a Nazi official's dispossessions "by force, duress and coercion" in Germany in 1937-1938 could not *conceivably* be acts undertaken unofficially and for purely personal motives.

The court below should have permitted the plaintiff to adduce evidence at a trial in respect to the character (*i.e.*, private or governmental) of the transactions complained of. Even the direct assertion that one is an agent of a government does not in and of itself necessitate the conclusion without proof that an act of his under inquiry is an "act of state". See *Horn* v. *Mitchell*, 223 Fed. 549, aff'd 232 Fed. 819, appeal dismissed 243 U. S. 247; *Poindexter* v. *Greenhow*, 114 U. S. 270, 288; *The Bank of the U. S.* v. *Planters' Bank*, 9 Wheat. 904, 907; *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549, 565-67; *The Beaton Park*, 65 F. Supp. 211, 212-213; *Pilger* v. *U. S. Steel Corp.*, 98 N. J. Eq. 665, 130 Atl. 523; *Molina* v. *Comision Reguladora*, 92 N. J. L. 38, 104 Atl. 450; *Kunglig Jarnvagsstyrelsen* v. *Dexter & Carpenter*, 32 F. (2d) 195; *United States* v. *Deutsches Kalisyndikat*, 31 F. (2d) 199.

As in *Land* v. *Dollar*, 67 S. Ct. 1009, 1011, this is clearly

> "the type of case where the question of jurisdiction is dependent upon decision of the merits".

Land v. *Dollar* appears controlling at the threshold in the instant case. It is in the tradition of a long line of leading cases in the federal courts and in England that prescribe ascertainment of the actually existent circumstances as the correct practice where, as here, the question of exercising jurisdiction turns on disputed facts. Cf. *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269; *McNutt* v. *General Motors*, 298 U. S. 178; *North Pacific Steamship Co.* v. *Soley*, 257 U. S. 216; *Gilbert* v. *David*, 235 U. S. 561; *Steigleder* v. *McQuestion*, 198 U. S. 141; *Wetmore* v. *Rymer*, 169 U. S. 115; *Roberts* v. *Lewis* 144 U. S. 653; *Princess Paley Olga* v. *Weisz*, (1929) 1 K. B. 718.

In the alternative, at the very least, the courts below should have permitted the plaintiff to amend his pleading so that there could be no dispute as to the private nature of the acts he alleged. Certainly, where there was a dispute as to the meaning of plaintiff's allegations, such dispute should not have been settled in this summary fashion without affording the petitioner an opportunity to present proof that there was no obstacle either to the court's jurisdiction or to its ability to proceed with the cause.

Still another reason why the lower courts should have set this case for trial is that *if* there be doubt as to the precise policy of the Executive toward Nazi Germany in this respect, such doubt should properly have been resolved by the taking of evidence: see Point "1-B", *supra*. The dissenting judge strenuously urged the importance of a trial to determine the issue of fact thus raised (R. 73, 74, 75).

In summarily dismissing the case on the plaintiff's pleadings, therefore, the court below denied the petitioner his right to a fair trial and to due process of law.

3. The District Court, on the record before it, lacked the power to dismiss the complaint.

The affirmance of the order of the District Court dismissing the complaint was error. The defendant's order to show cause (R. 5-6) was solely an application to vacate the warrant of attachment. The defendant's moving papers did not request a dismissal of the complaint or give notice that such a request would be made.

At the argument of the motion in the District Court the defendant's memorandum in support of the motion contained the following unsupported concluding statement:

"Point IV

"Plaintiff having failed to allege facts sufficient to state a cause of action, the warrant of attachment should be vacated, *and the complaint dismissed.*" (Italics supplied)

Under Rule 6(d) of the Federal Rules of Civil Procedure a motion to dismiss a complaint must be made on five days' notice. The petitioner was not served with five days' notice of such a motion. No shorter time having been fixed by court order and the petitioner not having waived the requirement of the rule, the motion to dismiss was not properly before the court.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Material Submitted to the Court Below Indicative of the Policy of the American Executive.

1. Establishment and proceedings of the International Military Tribunal (pursuant to agreement made August 8, 1945 and charter annexed thereto), reprinted in "Nazi Conspiracy and Aggression", U. S. Government Printing Office Publication, 1947.

2. Inter-Allied Declaration of January 5, 1943 (3 United Nations Review, 47; Department of State Publication 2630, European Series 15, p. 52).

3. Resolution No. VI at the Bretton Woods Conference (11 Department of State Bulletin No. 384, October 8, 1944).

4. Anglo-Soviet-American agreement made at Berlin (The Axis in Defeat, Department of State Publication 2423, pp. 10-18), par. 4.

5. Directive (JCS 1067) issued in April 1945 to Commander in Chief of the United States occupation forces in Germany (The Axis in Defeat, Department of State Publication 2423, pp. 40-59), pars. 44.d and 48.e (2) (3).

6. Military Government Law No. 52 (procurable from the War Department), Articles I, II and III.

7. Military Government Regulations (ditto), Title 17, pars. F, G.

8. American Organizational plans for Military Government of Germany (The Axis in Defeat, Department of State Publication 2423, pp. 60-62).

9. Allied agreement on requirements to be imposed on Germany, made in Berlin September 20, 1945 (The Axis in Defeat, Department of State Publication 2423, pp. 71-81), sec. VI, par. 19(a) and sec. XI, par. 42(b).

10. Treaty of peace with Hungary (Articles 24, 26 and 27), with Rumania (Articles 23, 24 and 25), with Bulgaria (Articles 22 and 23), and with Italy (Articles 75 and 78). (New York Times, January 18, 1947, pp. 25-36).

11. Military Government Law No. 1, entitled "Abrogation of Nazi Law" (Military Government Gazette, Germany, Issue No. 3, p. 1).

12. Control Council Law No. 1, entitled "Repealing of Nazi Laws", dated April 12, 1946 (procurable from War Department).

13. Article from New York Herald Tribune of March 12, 1947, concerning draft of first Restitution Law for Germany.

Directive, approved by the State, War and Navy Departments, to Gen. Lucius D. Clay, United States Commander in Germany, on the Military Government of that country (New York Times, July 16, 1947, p. 8):

"1. Purpose of This Directive

This directive, issued to you as commanding general of the United States forces of occupation and as Military Governor in Germany, constitutes a statement of the objectives of your Government in Germany and of the basic policies to which your

Government wishes you to give effect from the present time forward. It supersedes JCS 1067/6 and its amendments.

* * *

17. Restitution

* * *

d. It is the policy of your Government that persons and organizations deprived of their property as a result of National Socialist persecution should either have their property returned or be compensated therefor and that persons who suffered personal damage or injury through National Socialist persecution should receive indemnification in German currency. With respect to heirless and unclaimed property subject to internal restitution you will designate appropriate successor organizations."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 277

ARNOLD BERNSTEIN, also known as
ARNOLD M. BERNSTEIN,
Petitioner,

against

VAN HEYGHEN FRERES SOCIETE ANONYME,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

Opinion Below 1

Jurisdiction 1

Statement 2

Questions Presented 4

Summary of Argument 5

POINT I—Petitioner's Pleading Was Correctly Interpreted Below. There Is No Need for Re-Interpretation 5

POINT II—The Courts Below Correctly Applied the Doctrine That Our Courts Will Not Inquire Into the Acts of a Sovereign Government 10

Conclusion 14

Appendix 15

TABLE OF CASES

American Banana Co. v. *United Fruit Co.*, 213 U. S. 347 (1909) 11, 12

Auerbach v. *Internationale W. Lampen A. Gesellschaft*, 177 Fed. 458 (C. C., S. D. N. Y., 1910) 7, 8

Banco de Espana v. *Federal Reserve Bank of New York*, 114 F. (2d) 438 (C. C. A. 2d, 1940) 11, 12

Cold Metal Process Co. v. *McLouth Steel Corp.*, 126 F. (2d) 185 (C. C. A. 6th, 1942) 7

PAGE

Davis v. *Ensign-Bickford Co.*, 139 F. (2d) 624 (C. C. A. 8th, 1944) 7

Eisner v. *Vereinigte Industrie-Betriebe Fuer Den Osten*, 61 N. Y. S. (2d) 110 (Sup. Ct. N. Y. Co., 1946), *aff'd*, 62 N. Y. S. (2d) 603 (App. Div. 1st Dept., 1946) 14

Georgis v. *Giocalis*, 255 App. Div. 577, 233 N. Y. Supp. 16 (1st Dept., 1929) 8

Grassi v. *La Sociedad Bancaria Del Chimborazo*, 213 App. Div. 629, 210 N. Y. Supp. 705 (1st Dept., 1925) 9

Guaranty Trust Company v. *United States*, 304 U. S. 126, 139-41 (1938) 12

Holzer v. *Deutsche Reichsbahn-Gesellschaft*, 277 N. Y. 474 (1938) 11, 14

Kehaya v. *Axton*, 30 F. Supp. 838 (S. D. N. Y. 1940) 7

Kleve v. *Basler Lebens-Versicherungs-Gesellschaft*, 182 Misc. 776, 45 N. Y. S. (2d) 882 (Sup. Ct., N. Y. Co., 1943) 12, 14

Magnum Import Co. v. *Coty*, 262 U. S. 159 (1923) .. 7

Mayer v. *Hungarian Commercial Bank of Pest*, 21 F. Supp. 144 (E. D. N. Y., 1937) 7

McCarthy v. *Reichsbank*, 259 App. Div. 1016 (2d Dept. 1940) *aff'd*, 284 N. Y. 739 (1940) 7, 14

Miller Bros. Construction Co., Inc. v. *Thew Shovel Co.*, 248 App. Div. 150, 288 N. Y. Supp. 944 (1st Dept., 1936) *appeal denied* 272 N. Y. 678 8

Page v. *Arkansas Natural Gas Corp.*, 286 U. S. 269, 271 (1932) 6

Ricaud v. *American Metal Co.*, 246 U. S. 304 (1918).. 12

Southern Power Co. v. *N. C. Public Service Co.*, 263 U. S. 508 (1924) 6

PAGE

Texas & N. O. R. R. Co. v. *Brotherhood of Railway & S. Clerks,* 281 U. S. 548, 558 (1930) 6

Underhill v. *Hernandez,* 168 U. S. 250 (1897) ..10, 11, 12
Union Shipping & Trading Co. v. *United States,* 127 F. (2d) 771 (C. C. A. 2d, 1942) 11
United States v. *Belmont,* 301 U. S. 324 (1937) 11
United States v. *Commercial Credit Co.,* 286 U. S. 63, 67 (1932) 6
United States v. *Johnston,* 268 U. S. 220 (1925) 6
United States v. *Pink,* 315 U. S. 203 (1942) 13

Wade v. *Gates Rubber Co.,* 205 App. Div. 17, 20, 199 N. Y. Supp. 16, 18 (1st Dept., 1923)..... 9
Williams v. *Bruffy,* 96 U. S. 176, 185 (1877)..... 12
Wulfsohn v. *Russian Socialist Federated Soviet Republic,* 234 N. Y. 372 (1923), *appeal dismissed,* 266 U. S. 580 .....8, 11

RULES OF PROCEDURE

New York Civil Practice Act, Section 949..... 9
Rule 64, Federal Rules of Civil Procedure..... 7, 9

IN THE

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against

VAN HEYGHEN FRERES SOCIETE ANONYME,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

Neither the opinion of the District Court (50)* nor the opinion of the Circuit Court of Appeals (61) has as yet been officially reported.

Jurisdiction

The order of the Circuit Court of Appeals sought to be reviewed was entered July 10, 1947. Petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended (28 U. S. C. A. Section 347(a)).

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*Numbers in parenthesis refer to pages of the transcript of record.

Statement

This action to recover some $900,000 on various and alternative claims of conversion and money had and received was commenced in the Supreme Court of the State of New York, County of New York, by levy of an attachment against an alleged "debt" of approximately $450,000 owing respondent, a Belgian corporation doing no business in the United States, by a third party, Compagnie Maritime Belge (Lloyd Royal) S. A., sometimes referred to as the "Belgian Line", also a Belgian corporation. The writ of attachment was served on the representative of said third party in the United States, and subsequently purported service by publication was completed. Respondent has not appeared generally, no answer has been filed, and respondent appears in this Court solely for the purpose of opposing the petition for a writ of certiorari.

Following removal by respondent of the action to the Federal Court, respondent moved to vacate the warrant of attachment upon the ground that the papers upon which it was granted were "insufficient in that they did not establish a *prima facie* cause of action against defendant". The order (54-56) entered on the decision granting said motion and dismissing the complaint (50-53) was affirmed by the Circuit Court of Appeals for the Second Circuit (61-77), and petitioner seeks review of such order.

The petitioner's claim as set forth in the complaint and amplified by his affidavit in support of the attachment may be summarized as follows:

It is alleged that petitioner was at the time of the incidents in issue and is now a resident of the State of New York (18), but it appears that at the time of said incidents

he was actually a German national (petition for certiorari, p. 2) and, according to petitioner's brief in the Circuit Court of Appeals, he did not become an American citizen until 1940, long after the events in question transpired. Respondent is a foreign corporation existing under the laws of the Kingdom of Belgium (18). Petitioner was and is the sole owner of the entire capital shares of Arnold Bernstein Schiffahrtsgesellschaft, m.b.H., a German limited liability company, also known as the Arnold Bernstein Line, and, as such, was and is "solely entitled to the assets of the Arnold Bernstein Line in any liquidation thereof" (19). In 1937, petitioner, while in Hamburg, Germany, "on business of the Line which had headquarters there" was forcibly taken into custody by "Nazi officials" and "imprisoned" in a "jail", remaining in imprisonment until July, 1939 (12, 19). During his imprisonment "false charges" of violation of certain German Foreign Exchange Laws were made against him (12); no reference, significantly, is made as to the nature or outcome of such charges.

While so "imprisoned" he was compelled by "said Nazi officials" to execute documents purporting to transfer the entire capital shares of the Line to one Marius Boeger, a "Nazi designee" and "trustee" (12, 13, 19). This was accomplished by duress and by unlawful threats of severe bodily harm, indefinite imprisonment and death, business ruin, confiscation of his property and reprisals against his family (12, 19).

Petitioner, it is further claimed, being of the Jewish faith and aware of the Nazi "program of elimination of so-called non-Aryans", executed such documents of transfer solely by reason of such threats and duress and, accordingly, said documents were and are null and void (12, 19).

It is further alleged that the said Nazi "trustee" after taking such wrongful possession of the assets of the Line, including one of its ships, the "S. S. Koenigstein" (also known as the "S. S. Gandia"), sold the ship to respondent unlawfully and without fair and adequate consideration, respondent purchasing the ship knowing, or being in a position to know, of the alleged means by which the Nazi liquidator secured the vessel (13, 20).

Finally, it is asserted that subsequent to the acquisition of said vessel by respondent from the Nazi designated "trustee" in June, 1939, the vessel was chartered to the Belgian Line, later requisitioned for war purposes, and, while under charter in 1942 to the British Ministry of War Transport, was sunk (13). The proceeds of insurance, approximating $450,000, were paid by the Belgian Government to said Belgian Line for the account of respondent, these funds being the so-called "debt" of the Belgian Line to respondent which petitioner attempted to attach by serving a warrant upon the New York representative of said Belgian Line.

Questions Presented

The questions actually presented are:

1. Whether the Court below erred in finding, as did also the District Court, that the acts of coercion alleged in the complaint and affidavit supporting the attachment clearly constituted acts of the then sovereign German Government.

2. Whether the Court below erred in holding that the doctrine that courts of the United States will not review the acts of a foreign sovereign government done

within its own territory is applicable under the facts of this case.

Summary of Argument

I.

The Courts below correctly interpreted petitioner's complaint as challenging the acts of the sovereign German Government and certiorari should not be granted merely to review that interpretation.

II.

The Courts below correctly applied to the facts in this case the well settled principles that the courts of the United States will not review the acts of a foreign sovereign government done within its own territory, and held this principle applicable to preclude inquiry into acts of the recognized sovereign German government. The fundamental philosophy underlying the principle would be entirely disregarded if inquiry were first made to determine whether in the particular case the court approves the acts in question. No adequate reasons for reconsiderating this principle are presented.

Point I

PETITIONER'S PLEADING WAS CORRECTLY INTERPRETED BELOW. THERE IS NO NEED FOR RE-INTERPRETATION.

Petitioner's most persistent argument is that the Courts below misinterpreted the factual basis of his claim as set forth in the complaint and the supporting affidavit, in find-

ing that acts of the German Government only, rather than of private individuals were alleged. Petitioner's claim was fully stated in what may be assumed to have been a way most favorable to him in a complaint and affidavit prepared at leisure before suit began. The argument that the clear charge of official action should be interpreted to charge private action, rejected by both courts below, is mere afterthought. In this connection the District Court said (53):

> "It is clear from a reading of the complaint and affidavit that the acts of which the plaintiff now complains were the studied and deliberate acts of the German Goverment under the Nazi regime. *To hold otherwise would be to pervert the ordinary meaning of the words used.* These acts were performed within German territory and are not subject to review in our courts" (Italics ours).

With equal emphasis, the Circuit Court of Appeals demonstrated through petitioner's own language that petitioner alleged governmental acts (64-65).

Since the two lower courts have agreed on this interpretation of the facts, there should be no occasion for further review by this Court. Cf. *United States* v. *Commercial Credit Co.,* 286 U. S. 63, 67 (1932); *Page* v. *Arkansas Natural Gas Corp.,* 286 U. S. 269, 271 (1932); *Texas & N. O. R. R. Co.* v. *Brotherhood of Railway & S. Clerks,* 281 U. S. 548, 558 (1930).

This Court has repeatedly stressed the fact that the purpose of review by writ of certiorari is to settle important principles of law, not to afford an opportunity for a further consideration of whether a proper decision has been reached upon the facts in the particular case. *United States* v. *Johnston,* 268 U. S. 220 (1925); *Southern Power Co.* v.

N. C. Public Service Co., 263 U. S. 508 (1924); *Magnum Import Co.* v. *Coty*, 262 U. S. 159 (1923). Thus petitioner's arguments, so largely addressed to factual details, do not justify granting the petition.

Further pressing his argument that the lower courts failed to recognize the true facts of his claim, petitioner contends that there was error in failing to view his statements in the complaint and affidavit with sufficient liberality. Since jurisdiction of the respondent here depends solely on attachment remedies available only in the State Court, validity of the attachment must be tested by State rules. As noted by the Court below, Rule 64 of the Federal Rules of Civil Procedure (Appendix hereto) permits no other course.*

Under the law of New York, applicable here, in order to obtain the drastic remedy of attachment, here invoked in aid of a foreign cause of action against an absent foreign defendant, the burden was on petitioner "to submit affirmative proof that he has a good cause of action" (*McCarthy* v. *Reichsbank*, 259 App. Div. 1016, affd., 284 N. Y. 739),

*The latter part of Rule 64 of the Federal Rules of Civil Procedure, referred to by petitioner (petition pp. 18-19), providing that Federal rules shall govern procedures generally following removal, clearly cannot override the preceding provision of the same Rule that all remedies (including attachment) providing for seizure of property to secure satisfaction of a judgment are available "under the circumstances and in the manner provided by the law of the state in which the district court is held". And this interpretation has long been applied by the Federal Courts. *Mayer* v. *Hungarian Commercial Bank of Pest*, 21 F. Supp. 144 (E.D. N.Y. 1937); *Auerbach* v. *Internationale W. Lampen A. Gesellschaft*, 177 Fed. 458 (C.C., S.D. N.Y. 1910) see *Davis* v. *Ensign Bickford Co.*, 139 F. (2d) 624 (C.C.A. 8th, 1944); *Cold Metal Process Co.* v. *McLouth Steel Corp.*, 126 F. (2d) 185 (C.C.A. 6th, 1942); *Kehaya* v. *Axton*, 30 F. Supp. 838 (S.D. N.Y. 1940).

or, as was stated by New York State's highest court in its latest decision on the subject, and relied upon by the Court below, an attachment will not stand if the papers upon which it is based "clearly indicate that plaintiff must ultimately fail".*

The reasons for such strict requirements are clear. Attachment is an extraordinary remedy. The harshness of its application, a factor unquestionably influencing the Courts below, is well illustrated herein. Respondent, a Belgian corporation, maintains no office or agent in the United States, never has and does not now engage in business in the United States, and herewith is defending a suit all of whose incidents in question arose in Europe and whose determination involves foreign law exclusively. Only by the merest coincidence did petitioner achieve even a colorable attachment of an alleged "debt" owing respondent, a Belgian corporation, by a third party, likewise a Belgian corporation. Throughout the period of this suit almost half a million dollars of its assets are frozen and of no present use to it due to the fact that petitioner once used words in his attachment papers which he has ever since endeavored unsuccessfully to disown.

The authorities cited by petitioner as justifying extreme liberality of construction of his statement of claim properly apply only to motions involving genuine demurrers, i.e., motions to dismiss the complaint for failure to state a cause

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*_Wulfsohn_ v. _Russian Republic_, 234 N. Y. 372 (1923). See also _Auerbach_ v. _Internationale W. Lampen A. Gesellschaft_, 177 Fed. 458 (C.C., S.D. N.Y. 1910); See also _Georgis_ v. _Giocalis_, 225 App. Div. 577, 233 N. Y. Supp. 16 (1st Dept., 1929); _Miller Bros. Construction Co., Inc._ v. _Thew Shovel Co._, 248 App. Div. 150, 288 N. Y. Supp. 944 (1st Dept., 1936) _appeal denied_, 272 N. Y. 678.

of action upon which relief can be granted, and are not applicable here. Respondent's motion was specifically directed to the insufficiency of the attachment (5-6).

In any event, petitioner's argument on this point is disposed of by the fact that the Courts below found that not only had petitioner failed to make out a *prima facie* case, but that his papers affirmatively indicated that ultimately he must fail in the action (53, 65).

Petitioner repeatedly suggests that he has in some way been deprived of his "day in court" by disposition of the action on a "preliminary motion" (petition, pp. 5, 6, 7, 9, 18 and 24). There was nothing unusual in the procedure followed which was expressly authorized by the New York and Federal Practice.* New York Civil Practice Act § 949 (Appendix hereto); Federal Rules of Civil Procedure, Rule 64 (Appendix hereto). Petitioner refuses to recognize that because the attachment was defective he has failed even to obtain jurisdiction over the defendant and to establish his right to any hearing of his claim on the merits.**

Petitioner's unwarranted attack on procedure in the Courts below merely adds emphasis to the fact that he is

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*For cases to that effect see footnote page 14 hereof.

**Another example of petitioner's confusion as to the procedure involved herein is his insistence that the Court below had no power to dismiss the complaint (petition, pp. 24-25). Clearly, the only conceivable basis for jurisdiction here is the purported attachment of respondent's property. Upon vacating said attachment, such jurisdiction must necessarily fall and the complaint automatically fails for lack of jurisdiction. Moreover, no opportunity is permitted petitioner to repair the fatal defects in his attachment papers by amending the complaint or supplying supplemental affidavits. Such additional material cannot possibly retroactively cure an initially defective attachment. *Grassi* v. *LaSociedad Bancaria Del Chimborazo*, 213 App. Div., 629, 210 N. Y. Supp. 705 (1st Dept. 1925); *Wade* v. *Gates Rubber Co.*, 205 App. Div. 17, 20, 199 N. Y. Supp. 16, 18 (1st Dept. 1923).

seeking reinterpretation of his pleading, and thus a fresh review of the particular facts is unnecessary.

Point II.

THE COURTS BELOW CORRECTLY APPLIED THE DOCTRINE THAT OUR COURTS WILL NOT INQUIRE INTO THE ACTS OF A SOVEREIGN GOVERNMENT.

The rule that the courts of this country will not review acts of a foreign sovereign government* done within its own territory has been firmly established by decisions over a long period of time which embraces sweeping changes in political, economic and idealogical environment and thought. History and sober judgment have taught that the highest considerations of national and international policy demand that redress of individual grievances such as are involved herein through the medium of the courts of this country must be denied. The Courts below correctly concluded that no amount of sympathy for the plight of those subjected to injustice at the hands of the German Government justify departure from the settled rule.

The very essence of that principle is non-inquiry into such sovereign acts and refusal of the courts to consider whether or not any particular act should be disturbed, irrespective of personal feelings or convictions with re-

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*The Court may take judicial notice of the fact, and Department of State records indicate, that throughout the entire period significant here (January, 1937 to July, 1939) the Nazi Government was not only the *de facto* but the *de jure* government of Germany, accorded full recognition as such by the Government of the United States (*Underhill* v. *Hernandez,* 168 U. S. 250, 253 (1897)), which recognition continued until December 11, 1941.

spect to the act in question. Petitioner's narrow view that a determination of his claim would be innocuous because Germany is in no position to retaliate and for other appealing reasons arising from the specific factual situation does not dispose of the obviously broader and compelling considerations of higher policy here present. Proper conduct of international relations generally requires absolute recognition of sovereign acts and respect of sovereign independence.

In spite of the detailed development of this principle of law, petitioner unsuccessfully attempts to find a reason for denying its applicability here. The fact that it does apply is amply shown by authority refuting every contention petitioner makes in this respect. The element of personal malice which petitioner seeks to introduce (petition, p. 12) is excluded by the allegations that the Nazi program of persecution was directed against the Jewish race as a whole (20), as, indeed, the world knows was the case. The applicability of the principle is not affected by the fact that the acts in question were done through civil rather than military officers (*Banco de Espana* v. *Federal Reserve Bank of New York*, 114 F. (2d) 438 (C. C. A. 2d (1940)), *Underhill* v. *Hernandez*, 168 U. S. 250, 253 (1897); that such acts may be in flagrant violation of the law of the country where accomplished (*Banco de Espana* v. *Federal Reserve Bank of New York, supra;* Cf. *Union Shipping & Trading Co.* v. *United States*, 127 F. (2d) 771, 774 (1942)); that such acts may be utterly repugnant to our own laws and principles (*Underhill* v. *Hernandez, supra; American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357 (1909); *United States* v. *Belmont*, 301 U. S. 324, 329 (1937); *Wulfsohn* v. *Russian Socialist Federated Soviet Republic*, 234 N. Y. 372, 376 (1923), *appeal dismissed*, 266 U. S. 580; *Holzer* v.

Deutsche Reichsbahn-Gesellschaft, 277 N. Y. 474, 479 (1938); that the government official who did the act is claimed to have acted beyond the scope of his authority (*American Banana Co.* v. *United Fruit Co., supra,* 359); that the rights of an American citizen were involved (*Ricaud* v. *American Metal Co.,* 246 U. S. 304 (1918); *Underhill* v. *Hernandez, supra*); that the sovereign government in question was the German government, an enemy of this country (*Kleve* v. *Basler Lebens-Versicherungs-Gesellschaft,* 182 Misc. 776, 45 N. Y. S. (2d) 882 (Sup. Ct., N. Y. Co. 1943)); or that the government in question subsequently was overthrown (*Williams* v. *Bruffy,* 96 U. S. 176, 185 (1877); *Guaranty Trust Company* v. *United States,* 304 U. S. 126, 139-141 (1938); *Banco de Espana* v. *Federal Reserve Bank of New York, supra; Underhill* v. *Hernandez, supra.*

Petitioner concedes, as he must, that acts of the Executive in this sphere are binding upon our courts (petition, p. 15). That prerogative is not abandoned by the executive merely by the Executive's indication of policy to be followed, but only by a positive expression of its intent to do so. All aspects of petitioner's claim, even after settlement thereof, are and must continue to be inextricably bound up with the most complex international problems. The fact that the Executive has begun to act only strengthens the reasons for the courts' abstention. The confusion which would be introduced by intervention of the courts after the Executive has begun to deal with such claims may be of even more serious import than the reasons barring consideration by the courts before the Executive has begun to act.

The issue is not whether some policy capable of application to petitioner's claim may be discerned from what the

Executive has done, but whether the Executive has explicitly expressed the intention that the courts be relieved of the restriction on their consideration of the vast mass of such and related claims.* This fundamental point was clearly recognized and conclusively developed by the Circuit Court of Appeals in its opinion (69-71).

Furthermore, it must be remembered that jurisdiction herein depends solely upon an attachment issued by a state court. Obviously, intervention of a state court cannot be permitted to jeopardize or interfere with the conduct of foreign relations of the United States. (See Circuit Court of Appeals opinion, Record p. 71). Such interference would indeed, in the words quoted by petitioner "tend to disturb that equilibrium of our foreign relations which the political departments of our national government had diligently endeavored to establish". *United States* v. *Pink*, 315 U. S. 203, 233 (1941).

The arguments of petitioner resolve themselves into an attempt to persuade our courts to substitute their views on delicate international questions of a high order, involving, among other things, existing and future relations with other

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*In fact, the Executive has expressed a directly contrary intent. Law No. 5 of the Allied Control Council for Germany, October 30, 1945 (not applicable to petitioner's claim) vests in a German External Property Commission (Art. I) all interests in property outside Germany (with certain exceptions) owned or controlled by any German national or German business, corporation or legal entity (Arts. II and III) and makes it a punishable criminal offense to do or attempt to do anything in derogation of the Commission's title or interest in such property (Arts. XI, XII). Official Gazette of the Control Council for Germany, No. 2, Nov. 30, 1945, pp. 27-31.

Nothing can be gained by burdening the brief with analysis of the many acts, rulings, pronouncements, etc. of officials regarding control in Germany. One example suffices to indicate the trend of executive action.

nations, reparations, a history of past consummated transactions, economic readjustments and the like for the machinery of the executive branch of our government whose sole constitutional province it is. Such is not and cannot be the function of the judicial process and, indeed, in recent years the courts have consistently rejected such suggestions in cases involving Nazi persecution of Jewish nationals which had a similar appeal to that arising from the facts as alleged by petitioner.* Neither there nor here is there any basis whatever for reversing or distinguishing the line of cases relied upon by the Courts below.

CONCLUSION

The case was correctly decided below; there is no conflict of decisions and, as the decision below depends on particular facts, it is of no general importance. The Court has so often set forth and applied the principles of law here involved that no further consideration thereof is now needed. The petition for a writ of certiorari should be denied.

Respectfully submitted,

LOUIS CONNICK,
Counsel for Respondent,
Appearing specially.

SIMPSON THACHER & BARTLETT,
Of Counsel

September 10, 1947

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*See *Holzer* v. *Deutsche Reichsbahn-Gesellschaft*, 277 N. Y. 474 (1938), *McCarthy* v. *Reichsbank*, 259 App. Div. 1016, affd. 284 N. Y. 739 (1940), *Eisner* v. *Vereinigte Industrie-Betriebe Fuer Den Osten*, 61 N. Y. S. (2d) 110 (1946), all of which cases, as here, were decided on preliminary motions directed to the pleadings, *Kleve* v. *Basler Lebens-Versicherungs-Gesellschaft*, 182 Misc. 776, 45 N. Y. S. (2d) 882, (1943).

APPENDIX

Rules of Civil Procedure—Rule 64

"RULE 64. SEIZURE OF PERSON OR PROPERTY

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

Civil Practice Act—Section 949

"§ 949. How and to whom application shall be made; new proof. An application, specified in the last section, may be founded only upon the papers upon which the warrant was granted; in which case, it must be made to the court, or, if the warrant was granted by a judge out of court, to the same judge, in court or out of court, and with or without notice, as he deems proper. Or it may be founded upon proof on the part of the defendant; in which case, it must be made to the court, or, if the warrant was granted by a judge out of court, to any judge of the court, upon notice. If founded wholly or partly upon proof, it may be opposed, as a matter of course, by new proof on the part of the plaintiff."

INDEX

PAGE

Table of Contents

Index i

Preliminary Statement 1

The Issues Presented 3

Argument 5

I—Whether or not the "act of state" doctrine is applicable at all to acts of the defunct Nazi government, it should not be broadened so as to extend to unofficial acts of members of the Nazi party 5

II—The Second Circuit rule against "review" under foreign municipal law of defective foreign "acts of state" contradicts the practice of this Court and should be repudiated 6

III—The reasons underlying the "act of state" doctrine as developed by this Court do not permit its application to acts of the defunct Nazi government 8

IV—The decision below fails to give due effect to a well-defined policy of the political department in the field of foreign affairs and therefore violates a principle firmly established by this Court 10

Conclusion 12

Cases PAGE

American Banana Co. v. United Fruit Co., 213 U. S. 347 (1909) 7
Canada Southern Ry. v. Gebhard, 109 U. S. 527 (1883) 7,8
Carrington v. The Merchant Ins. Co., 8 Pet. 495 (1834) 7,8
Church v. Hubbart, 2 Cranch. 187 (1804) 7,8
Mexico v. Hoffman, 324 U. S. 30 (1945) 10
Oetjen v. Central Leather Co., 246 U. S. 297 (1918) 7,8,9
Princess Paley Olga v. Weisz, [1929] 1 K. B. 718 6
Ricaud v. American Metal Co., 246 U. S. 304 (1918) 7
Underhill v. Hernandez, 168 U. S. 250 (1897) 7,8
United States v. Pink, 315 U. S. 202 (1942) 7,10
Williams v. The Suffolk Ins. Co., 13 Pet. 415 (1839) 10

Statutes and Miscellaneous

Dept. of State Publication No. 2743, European Series 21 11
Dept. of State Release No. 582, July 11, 1947 10
Mann, The Sacrosanctity of the Foreign Act of State (1943), 59 L. Q. Rev. 42 8
The New York Times, January 4, 1938 6
4 Office of United States Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression 5
The Public Papers and Addresses of Franklin D. Roosevelt (1938 volume) 9
Sack, War Criminals and the Defense of Act of State in International Law (1945), 5 Lawyers Guild Rev. 288 8
2 Süddeutsche Juristen-Zeitung 3

Supreme Court of the United States

OCTOBER TERM, 1947

No. 277

ARNOLD BERNSTEIN, also known as ARNOLD M. BERNSTEIN,
Petitioner,

against

VAN HEYGHEN FRERES SOCIETE ANONYME.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMERICAN JEWISH CONGRESS, AS AMICUS CURIAE, IN SUPPORT OF PETITION

Preliminary Statement

The American Jewish Congress, which submits this brief, is a membership corporation chartered under the laws of the State of New York "to safeguard the civil, political, economic and religious rights of the Jews in all countries" and "to secure effective remedies, assistance and redress in all cases of injustice, hardship or suffering arising out of discriminatory measures or practices against Jews, or from the violation or denial of their lawful rights."

The Jewish minority suffered more grievously than any other group from Nazi fury. Its members became the target of ferocious attack solely by reason of their faith and origin. Its survivors and heirs are foremost among

those having rightful claims for redress—to the very limited extent that redress remains possible at all.

The American Jewish Congress is therefore impelled to oppose a precedent which would close the doors of our courts to all victims of Nazi brutality and rapacity in the Third Reich,—a precedent which, we believe, conflicts with decisions of this Court and misinterprets national policies in the field of foreign affairs.

The stake involved in this narrow aspect of the decision below is more than mere convenience in the enforcement of private rights. Restrictions upon the transfer of funds render a judgment recovered in almost any European country worthless to a plaintiff who resides here. In this situation only American courts can give effective relief to our residents.

The American Jewish Congress is further concerned about the broad and disastrous implications of the decision below upon the process of restitution to the victims of Nazi persecution abroad. The American government, by suggesting enactments in liberated countries and through military government regulations, armistices and peace treaties in enemy territory, has brought about most of the results so far achieved in the return of looted property to victims of Nazi oppression. Its influence would be seriously undermined by what Judge Clark, in his dissent below, described as the mystifying effect upon our allies as well as our enemies of "the vagaries of a policy looking to restitution to the Jews in Germany at the same time that it accepts the acts of Nazi oppression of the Jews as binding in American courts" (R. 76).

That would be so if the decision relied on juridical theorems only, for even in that event it would be understood abroad as a symptom of American indifference to the problem. But the decision is actually based upon an interpretation of national policies in foreign affairs. The majority below seems to impute to the executive a desire to remain free to trade, in some future diplomatic bargain, an abandonment of its present position in favor of restitu-

tion, and therefore an unwillingness to accept even the slight impairment of its freedom of action in this respect which could result from judicial determinations in isolated cases. Coming at the very time when the same issue with respect to disposition of Nazi loot in Austria faces representatives of our government in grave diplomatic negotiations, this proclamation of a policy of expediency and skepticism threatens to impede, if not wreck, the constructive work in which the political department is actually engaged.

It is for these reasons that the American Jewish Congress joins the petitioner in urging that this Court grant review of the decision below.

The Issues Presented

The decision below must stand or fall on the *federal* ground on which it was placed; namely, that the matter is not one for judicial cognizance.

The Court of Appeals made clear that plaintiff's defeat is not due to any difficulty arising under local law. Indeed, it recognized that the sordid transaction revealed by this record is "utterly odious to the accepted standards of justice" prevailing in New York (R. 66).

The Court of Appeals also accepted the thesis, which we had expounded in an *amicus curiae* brief below, that the specific instance of looting involved in the instant case was tortious according to the Nazi regime's own "law" and would be presently remediable in a German court if jurisdiction in that country could be obtained (R. 65).[1]

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[1] We have since obtained further material, in particular a decision of the Kammergericht, Prussia's highest appellate court, of October 29, 1946, reported in (1947) 2 Süddeutsche Juristen-Zeitung 257, which affords conclusive proof of this contention. We refrain on this petition from burdening the Court with an exposition of foreign law and with the foundation as to judicial notice which that might require; but we hope, if and when this Court considers the merits of the case, to be allowed to assist it with pertinent information of this nature.

This thesis perhaps does not need to be proved at all at the present stage. The result reached below requires a certainty "that the plaintiff must ultimately fail" (R. 64). If the decision depends upon foreign law, a mere possibility that such law might support plaintiff's position would be sufficient.

Plaintiff, therefore, has a completely valid case under local and foreign law, at least for present purposes, unless recovery is conclusively barred by the "act of state" doctrine. The applicability of that doctrine here depends on the validity of each of four propositions adopted by the court below:

(1) that plaintiff's attachment papers present the transaction complained of as a *governmental* act (R. 64-65);

(2) that purported official action of a foreign government which derives no effect from the foreign country's own *municipal* law is nevertheless conclusive upon our courts (R. 65);

(3) that the outrages alleged in this record, if attributable to the defunct Nazi government as such, must be treated with the respect which may be due to sovereign measures of a traditional type taken by a friendly nation (R. 71-72); and

(4) that the policy of redress for Nazi crimes so far pursued by our executive—including the hanging of the master criminals—is not outspoken enough to compel adherence by the judiciary (R. 65-70).

ARGUMENT

I

Whether or not the "act of state" doctrine is applicable at all to acts of the defunct Nazi government, it should not be broadened so as to extend to unofficial acts of members of the Nazi party.

It is common knowledge that the Nazi regime hesitated until after its diplomatic triumph at Munich in 1938 to take any official steps against Jewish property.[2] Prior "aryanizations", the work of underlings of the Nazi party acting in pursuit of personal greed, for their private profit and not in any official capacity, may have been rendered possible by the benevolent toleration of a violently anti-semitic government. But at that time the Hitler government did not yet dare to identify itself with the looting, refused to take any part of the spoils, and continued to pay lip service to the civilized property laws of the Weimar republic which were still on the books.

True, threats of abuse of official power were usually the instrument of depredation. But the spoliations served private rapacity only and were accomplished by naked extortion without any pretense of pseudo-legality or of governmental sanction. They culminated in the coerced execution by the victims of ordinary documents of transfer to private beneficiaries. The *legal* structure of these early transactions has nothing in common with the confiscations by administrative decree which were to follow after 1938.

The exact date of the plundering is not specified in the record and remains a triable issue. Contemporaneous newspaper accounts, however, reveal that the *affaire* Bern-

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[2] The confiscation of Jewish property was initiated by the Order Eliminating Jews from German Economic Life, of November 12, 1938, (1938) 1 Reichsgesetzblatt 1580, translated in 4 *Office of United States Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression* 172.

stein occurred during the earlier period and followed the earlier pattern.[3]

The realities of the situation are therefore utterly inconsistent with the interpretation placed below upon the attachment papers.

This is not merely a question of construction of pleadings. That the mere words "Nazi officials"—which come close to carrying a presumption of criminal guilt under the Nuernberg verdict—should be given the magic effect of precluding our courts from questioning whether acts perpetrated by persons thus referred to were of a private or governmental nature would be utterly intolerable. If the "act of state" doctrine of the Second Circuit is not to be discarded altogether, or at least in this context, it should in any event be circumscribed and administered with restraint. Contrast the disposition of this case on affidavits by the court below with the painstaking analysis of extensive testimony by the Court of Appeal in *Princess Paley Olga* v. *Weisz,* [1929] 1 K. B. 718, 726-728, in determining whether the contents of the Princess' palace in Russia had been seized under the authority of the Soviet government rather than pillaged by common robbers.

On this record the court below was not compelled to set a disturbing precedent and to assume responsibility for interpretation of national policies. The "act of state" issue would probably disappear if the case were sent to trial.

II

The Second Circuit rule against "review" under foreign municipal law of defective foreign "acts of state" contradicts the practice of this Court and should be repudiated.

This Court has repeatedly held that the courts of this country owe to the official acts of a foreign government

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[3] See cable dated Hamburg in The New York Times, January 4, 1938, under the headline: "Bernstein gives up his shipping stock."

the same respect which they enjoy at home. Thus it has decided that such acts may not be attacked here on the ground that they violate international treaties (*Oetjen* v. *Central Leather Co.*, 246 U. S. 297 (1918)); the laws of an earlier regime (*Underhill* v. *Hernandez*, 168 U. S. 250 (1897); *Ricaud* v. *American Metal Co.*, 246 U. S. 304 (1918)),[4] or the forum's statutory law or "public policy" (*American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909); *United States* v. *Pink*, 315 U. S. 202 (1942)). Where, however, an "act of state" has been challenged on the ground that it violated the municipal law of the foreign country itself, this Court has never hesitated to resolve that issue. *Canada Southern Ry.* v. *Gebhard*, 109 U. S. 527 (1883); *Carrington* v. *The Merchant Ins. Co.*, 8 Pet. 495 (1834); *Church* v. *Hubbart*, 2 Cranch. 187 (1804).

Nevertheless, the court below held that the rule of the *Oetjen* and other cases cited above requires that our courts give conclusive effect even to "acts of state" which are utterly void and open to collateral attack when and where committed. In doing so the court relied for controlling precedent solely on decisions reached in that Circuit and said, "if we have been mistaken, the Supreme Court must correct it" (R. 65).

For a court to find fault with a manifestation of foreign sovereign power requires, of course, tact and caution. Yet just that is done regularly today with respect to "acts of state" of an extra-territorial nature and with respect to judgments. No reason appears why it should be forbidden

[4] These two cases arose from successful revolutions which were followed by our diplomatic recognition of the insurgent party. The question was whether action taken by the rebel body prior to its recognition should be tested by the old legal order against which it offended or by the new standards from which it derived sanction. It was held that recognition "validates" prior acts of the new government.

by a rigid rule in the case of those local acts of a foreign government which are repudiated by its own laws.[5]

We submit that the rule announced by the court below conflicts with the *Canada, Carrington* and *Church* cases, *supra,* and, in any case, represents a substantial and novel extension of the rule of the *Underhill* and following cases which raises an issue of general importance which has not been, and should be, decided by this Court. The Second Circuit rule stems from an obsolete concept of sovereign dignity and narrow territorialism. Unless it is abolished, American business will be at a serious disadvantage in its transactions with other countries at a time when government intervention in commercial affairs is the rule rather than the exception abroad.

III

The reasons underlying the "act of state" doctrine as developed by this Court do not permit its application to acts of the defunct Nazi government.

The *Oetjen* case [6] is based on the ground that judicial disapproval of foreign sovereign acts might result in undesirable international friction. That danger exists only if the government whose act is to be disapproved is still in existence. For our courts to "sit in judgment" on the acts of the Nazi regime, which has been destroyed and its leaders hanged, cannot possibly "imperil friendly relations between nations".

Again, judges may find it embarrassing to resolve controversial issues as to the merits of administrative or

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[5] For a modern British view and a complete analysis of this problem, see *Mann, The Sacrosanctity of the Foreign Act of State,* (1943) 59 L. Q. Rev. 42; and *cf. Sack, War Criminals and the Defense of Act of State in International Law* (1945) 5 Lawyers Guild Rev. 288.

[6] *Oetjen* v. *Central Leather Co., supra.*

political measures taken by a civilized foreign nation. No such problem exists here. The merits of the barbarous campaign of annihilation waged by the Hitler regime against a helpless minority are not controversial. History has passed its judgment, and to conform with that judgment is not a delicate task.

Since November, 1938—long prior to the purchase of plaintiff's vessel by the defendant—and up to the outbreak of the war, a United States Government conscious of its moral responsibilities, in protest against wanton excesses inflicted upon the Jewish minority in Germany, left our representation in Berlin in the hands of a chargé d'affaires [7] and thus deliberately brought on just that friction which the *Oetjen* case and its successors enjoin the judiciary to avoid. In the words of Judge Clark's dissent below: "Those precedents do not deal with, or even appear to visualize, the situation where our Executive acts later to repudiate the recognition which it has granted and to declare the acts of that nation as wrongful and void, to be wiped out by a tremendous war effort and by acts of restitution and retribution at the war's end" (R. 73).

Plaintiff is entitled to relief by all possible standards of justice and decency if he can prove that defendant was actually a knowing beneficiary of the crude extortion alleged in the complaint. Only the "act of state" doctrine stands in the way. The reasons for that doctrine are clearly inapplicable in this instance. Legal symmetry certainly does not require our courts to treat the loathsome activities of Nazi gangsters as the sovereign action, within established patterns of civilized government activity, of a foreign nation in good standing.

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[7] The reasons for the recall of our Ambassador are to be found in "Statement on Racial Persecution of German Government," The Five Hundredth Press Conference, November 15, 1938, *The Public Papers and Addresses of Franklin D. Roosevelt,* 1938 Volume, 596-597.

IV

The decision below fails to give due effect to a well-defined policy of the political department in the field of foreign affairs and therefore violates a principle firmly established by this Court.

The position of the executive is clearly summarized in paragraph 17(d) of the recent Directive Regarding the Military Government of Germany, of July 11, 1947, State Department Release No. 582:

> It is the policy of your Government that persons and organizations deprived of their property as a result of National Socialist persecution should * * * have their property returned * * *.

A more explicit pronouncement can hardly be imagined.

The majority below nevertheless believed that the executive is unwilling to have this policy acted upon by our courts. But unequivocal expressions of policy in the field of foreign relations have always been considered as conclusive without a further specific request by the political department that the courts fall in line. *United States* v. *Pink, supra.*

The very question whether the absence of such a specific request by the executive leaves the courts free to take a position antagonistic to the diplomatic practice of the nation was set at rest by *Mexico* v. *Hoffman,* 324 U. S. 30 (1945).

Nor is any more explicit enunciation of policy required to overcome whatever binding effect a foreign "act of state" might otherwise have. That was settled as far back as *Williams* v. *The Suffolk Ins. Co.,* 13 Pet. 415 (1839).

These decisions have been by-passed on the ground that judicial enforcement of the national policy would in this instance be "destructive of the underlying necessities of a treaty of peace" (R. 70). But Judge Learned Hand's

opinion concedes that the relationship between this American plaintiff and this Belgian defendant would not even properly be the subject of disposition in a treaty to be signed with Germany; it ultimately considers only a possible tenuous claim over, which the Belgian Government might assert against Germany on behalf of defendant (R. 69-70).

Yet, defendant did not deal with the Nazi government; it purchased the vessel from a commercial corporation (R. 26). The transactions challenged by the complaint occurred before the outbreak of hostilities and were not acts of foreign war. If the hypothetical claim of Belgium nevertheless had merits, it would not necessarily "have to be adjudicated as an item of the general claim for reparations against Germany," as Judge Hand assumed (R. 70). The peace treaties with Italy and Bulgaria do not mention at all the problem of restitution to victims of religious, racial or political persecution, because these countries had made satisfactory arrangements during the armistice. The treaties with Rumania and Hungary [8] merely compel continuation of our policy by the defeated nations. There are thus four precedents to the effect that such claims may well "be left to the decision of * * * other tribunals than those to which the ascertainment of reparations will be left" (R. 70).

The executive should best know its business. In its opinion restitution at this time is not premature and will not complicate the task of peace-making. Under the Directive it would be the duty of the Commander-in-Chief of our Occupation Forces to bring about a return to plaintiff if the vessel had not been sunk and were presently located in a German port. That return would have the very same effect upon the future peace treaty as the judgment demanded in this action.

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[8] Department of State Publication No. 2743, European Series 21; Rumania, Article 25; Hungary, Article 27.

CONCLUSION

The decision below is in undeniable conflict with this Court's repeated holdings that the judiciary must conform with executive policies in international affairs.

It also departs from the practice of this Court which until now has been to examine freely whether a foreign governmental act complies with the applicable foreign law. There are further presented two important problems relating to the scope of the "act of state" doctrine: whether it can possibly be extended to acts of Nazi oppression; and, if so, whether the mere participation in a transaction of persons referred to as "Nazi officials", without more, should put the rule in operation.

We respectfully submit that these legal considerations are ample to justify review. The international ramifications of the problem, however, call perhaps still more urgently for an exercise of this Court's power of supervision. The interpretation of national policies imposes a grave responsibility upon courts. The exact significance of a denial of certiorari is not understood abroad and such a disposition would certainly be claimed to indicate approval. No pronouncement of a lower court on such a matter should be allowed to remain the final word.

The petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

WILLIAM MASLOW,
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Amicus Curiae.

WALTER HERZFELD,
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October 1947.